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In The
Supreme Court Of The United States

OCTOBER TERM, 1973

No. 73-1864

S. K. BROWN,

Petitioner,

vs.

Georgia Power Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (App. 4 of Petition) is reported at 371 F. Supp. 543. The opinion of the Court of Appeals for the Fifth Circuit (App. 1 of Petition) is reported at F.2d .

QUESTIONS PRESENTED

1. Whether the dismissal of petitioner's Federal lawsuit which thereby relegated petitioner to seek relief in state forums was in harmony with existing Federal law.

2. Whether this Court should grant a writ of

certiorari to consider issues which are not essential to the proper disposition of the case or which have been previously decided adversely to petitioner.

3. Whether this Court will grant a writ of certiorari to consider matters raised for the first time in the petition and which are *dehors* the record.

STATEMENT OF THE CASE

Georgia Power is a public utility engaged in the business of producing and distributing electric power. In order to meet growing public demand for energy, Georgia Power selected a 1,200 acre site in rural Burke County, Georgia for construction of electrical generating facilities - presently gas turbine facilities, and in the future nuclear facilities. (Supp. A. 29-36).[1]

After unsuccessfully attempting to purchase petitioner's (hereinafter referred to as "Brown") land, Georgia Power, pursuant to the authority granted it by the laws of the State of Georgia, *viz.*, Ga. Code Ann. Chapter 36-6A, commenced a condemnation action in the Superior Court of Burke County on August 11, 1971, (Supp. A. 5-9). By order of the Superior Court a Special Master was appointed to conduct a hearing and determine the value of Brown's land. (Supp. A. 10; Ga. Code Ann. §36-605a-606a). Notice in the form of a citation was served on Brown. (Supp. A. 16). In the citation Brown was notified that he was *"required"* to raise all matters material to his rights in the land before the Special Master. (Supp. A. 13). Upon the request of Brown, the date of the Special Master's hearing was continued until August 31, 1971, in order to

[1] "A" references are to the printed appendix on appeal to the United States Court of Appeals for the Fifth Circuit. "Supp. A" references are to the printed supplemental appendix on appeal to the Court of Appeals for the Fifth Circuit.

accommodate the fact that Brown had employed counsel. (Supp. A. 19).

On August 31, 1971, a condemnation hearing in the case was held before Special Master R. U. Harden, Esquire. At the commencement of the hearing Mr. Harden asked: "Do you have any further motions before we start?" At that time the plaintiff's attorney said: "No. I think we are ready to proceed." (Supp. A. 22). Thereafter, plaintiff's attorney made a motion in which he argued that there was no evidence showing the necessity for the taking of the property. He stated that in the absence of such a showing there would be a violation of the Fourteenth Amendment of the United States Constitution. (Supp. A. 101-102). Plaintiff's attorney made no other challenge to the legality of the proceeding or in regard to Georgia Power's authority to condemn.

After hearing argument by counsel, the Special Master denied the motion. (Supp. A. 105).

On Thursday, September 2, 1971, two days after the hearing, the Special Master made an award which was duly filed in the Burke County Superior Court. (Supp. A. 143). On September 2, 1971, a judgment approving the award was signed by Judge William M. Fleming, Jr. of the Burke County Superior Court. (Supp. A. 147). Brown had filed no exceptions with the Superior Court prior to its entry of judgment.

On September 10, 1971, Brown, as condemnee, filed a document which he described as an Answer, and also an Appeal to the Superior Court of Burke County. (Supp. A. 155, 157). These documents alleged that the award of the Special Master was improper because it violated the United States

Constitution. Georgia Power Company filed motions to strike the allegations concerning the constitutional issues on the grounds that under Georgia law these could not be considered by the Superior Court on an appeal since the issue of constitutionality was raised before the Special Master and exceptions were not filed to the adverse rulings prior to the Superior Court entering a judgement approving the award by the Master.

The Superior Court, *after a hearing* and *after argument from counsel,* entered orders striking Brown's Answer and Appeal. (Supp. A. 160, 161; App. 30-31, 37-38 of Petition).

At that juncture, Brown still had the right to appeal before a jury the $55,750.00 valuation which the Special Master had put on his land. This he did in a jury trial on August 28, 1972. The jury increased the valuation to $70,000.00. (Supp. A. 162-63).

Georgia Power had previously paid the $55,750.00 into the registry of the Superior Court on Brown's account. Brown subsequently withdrew these funds by having $39,705.45 paid to himself and having $16,044.53 paid to Farmers Production Credit Association. (Supp. A. 153).

On September 28, 1972, Brown, through his attorneys, Jerry M. Daniel, Esquire and George W. Fryhoefer, Esquire, filed in the Superior Court of Burke County a "Motion for New Trial". An order of the Superior Court set October 31, 1972 as the date for a hearing on the motion. (Supp. A. 165). However, continuances have been granted since that time and the motion is still pending before the state tribunal. Upon the disposition of that motion, Brown will then have the option to pursue state

appellate remedies as allowed by law.[2]

The present Federal action was commenced in the United States District Court for the Southern District of Georgia, Augusta Division, on January 30, 1972 (A. 1). Upon Georgia Power's motion, the District Court entered an opinion order granting summary judgment in the Company's favor. (A. 36). The court's order was based upon an application of principles of *res judicata*.

This order was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed in a *per curiam* opinion citing the opinion of the District Court. The Court of Appeals did briefly state that it too was of the opinion that whatever relief Brown might seek should be sought in the state appellate courts.

ARGUMENT

INTRODUCTION

Before considering the matters presented in the petition, some elaboration concerning the Georgia eminent domain procedure should be helpful. In order to provide a simpler, more effective, and quicker method of condemnation, the Georgia legislature passed what is known as the Special Master Act, Ga. Code Ann. Chapter 36-6A. The statute contemplates that the Special Master shall conduct a hearing at which he will decide issues falling into two categories - - i.e., value of the land and all "other material matters".[3] For issues

[2] Ga. Code Ann. §6-803. Accordingly, this Court should view petitioner's arguments in light of the fact that Brown still has his rights to appeal in Georgia and to then seek review by certiorari. On appeal from the pending litigation in the state court, Brown may assert as error each of the questions which he attempts to have this Court consider.

[3] Ga. Code Ann. §36-613a, §36-605a.

concerning value, a condemnee may state his case before the Special Master, and then, if a notice of appeal is filed within 10 days of the Special Master's award, the condemnee may have a *de novo* trial on value before a jury in the Superior Court.[4] This provision for notice of appeal within 10 days and the *de novo* trial concerns the question of value only. *Leach* v. *Georgia Power Company*, 228 Ga. 16, 22, 183 S.E.2d 755 (1971).

For issues other than value, e.g., the validity of the procedure, the authorization of the condemnor, necessity for taking, another route must be followed. First the condemnee is ordered in the "Citation" (Supp. A. 11-13) and by the statute (Ga. Code Ann. §36-605a) to initially present these matters to the Special Master for his determination. Georgia appellate decisions have consistently held that this is a mandatory step in raising and preserving such issues.[5]

If the Special Master rules adversely to the condemnee on any of these non-value matters, the condemnee's recourse is to the Superior Court by filing exceptions to the Special Master's rulings. This must be done before the Superior Court adopts the findings of the Special Master and makes those findings the judgment of the court. When the Superior Court enters judgment on the Master's award, that is a final determination of every issue except value, to which the ten day appeal process

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[4] Ga. Code Ann. §36-614a.

[5] **Wiggins** v. **City of Macon,** 120 Ga. App. 197, 199, 169 S.E.2d 667 (1969); **Johnson** v. **Fulton County,** 103 Ga. App. 873, 881, 121 S.E.2d 54 (1961).

still applies, and title then vests in the condemnor.[6] The Special Master may submit his award to the Superior Court at any time within three days after the hearing.[7] After the receipt of the Special Master's award at some time within the three days, the Superior Court may forthwith enter a judgment based on the award.[8]

In sum to raise and preserve matters other than the value of the land, a condemnee must do two things. He must raise the issue before the Special Master, and must immediately file exceptions to the Master's rulings or possible rulings before the Superior Court receives the award and enters judgment on it.[9]

THE LOWER COURT'S APPLICATION OF RES JUDICATA IS IN HARMONY WITH EXISTING FEDERAL LAW.

When the Superior Court entered judgment on the Special Master's award, it cut off the time for excepting to the award on grounds other than value. The judgment was final as to the validity of the condemnation and the vesting of title in condemnor. The Superior Court expressly reaffirmed

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[6] Ga. Code Ann. §36-613a; **Leach** v. **Georgia Power Company,** 228 Ga. 16, 183 S.E.2d 755 (1971); **Nodvin** v. **Georgia Power Company,** 125 Ga. App. 821, 189 S.E.2d 118 (1972); **Johnson** v. **Fulton County,** supra, n.5.

[7] Ga. Code Ann. §36-612a.

[8] Ga. Code Ann. §36-613a.

[9] Since the Code does not provide for a specific time other than a three day period for the Special Master to file his return, a condemnee must be prepared for the return to come at any time within three days and thus should have his exceptions filed at the close of the Special Master hearing.

this position when it later struck the "Answer" and "Appeal" which attempted to raise non-value objections to the condemnation.

It was correctly determined by the District Court below that this action by the Superior Court was an adjudication on the merits of Brown's claim, *to wit,* that he was not denied due process in not being notified when the Special Master's award was to be made the judgment of the Superior Court so he could first file exceptions. It was also an adjudication on the merits of whether the 10 day period for appeals on "value" applies to appeals on other matters as well.

The Courts of Georgia have repeatedly held that the entry of judgment on the Special Master's award by the Superior Court is a final adjudication of all matters other than value.[10] The fact that Brown was foreclosed because the Superior Court ruled according to the Georgia decisions requiring Brown's exceptions to be filed before judgment on the Special Master's award makes the adjudication no less binding in regard to the Constitutional due process claims. A holding preventing the filing of exceptions after entry of judgment is an implicit rejection of the argument that the Georgia procedure offends due process.[11]

There having been a final judgment by the Superior Court that rejected (directly or implicitly)

[10] **Phillips** v. **Georgia Power Company,** 225 Ga. 289, 168 S.E.2d 150 (1969); **Fulton County** v. **Aronson,** 216 Ga. 497, 117 S.E. 2d 166 (1960); **Nodvin** v. **Georgia Power Company,** 125 Ga. App. 821, 189 S.E.2d 118 (1972); **Johnson** v. **Fulton County, supra,** n. 5.

[11] **Angel** v. **Bullington,** 330 U.S. 183, 190 (1946); **Grubb** v. **Public Utilities Commission of Ohio,** 281 U.S. 470, 478-79 (1930).

the claims by Brown, it is incumbent upon Brown to seek review in the state appellate system and then the United States Supreme Court. He was correctly denied access to the District Court to begin anew with a collateral suit.[12] [13]

PLEADING A CASE UNDER 42 U.S.C. §1983 DOES NOT CIRCUMVENT THE LAW REGARDING BAR BY JUDGMENT.

Brown suggests that pleading a case under a Civil Rights statute opens the door to a Federal forum regardless of a previous adjudication in a state forum. However, the authority cited in support of this contention is not on point. *County of Allegheny* v. *Frank Mashuda Co.*[14] was a diversity case which simply allowed a district court to hear a case in which the prerequisites of diversity jurisdiction were met. The case just happened to be a condemnation matter. *Mitchum* v. *Foster*[15] *established that 42 U.S.C.* §1983 was a legislated exception to the federal anti-injunction statute.[16] It by no means indicated that the Civil Rights Act created an exception to finality of judgments and the law of "full faith and credit".[17]

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[12] **Angel** v. **Bullington,** 330 U.S. at 189-190.

[13] The pending motion for a new trial by Brown does not lessen the res judicata effect of the Superior Court rulings. **Pope** v. **Shipp,** 38 Ga. App. 483, 144 S.E. 345 (1928); **Denham** v. **Shellman Grain Elevator, Inc.,** 444 F.2d 1376, 1380 (5 Cir. 1971). Brown's citation of a case (Petition, p. 17) which was actually appealed is inapposite.

[14] 360 U.S. 185 (1959).

[15] 407 U.S. 225 (1972).

[16] 28 U.S.C. §2283.

[17] 28 U.S.C. §1738.

To the contrary, the great majority of lower Federal courts which have considered the question have held that 42 U.S.C. §1983 does not transcend the finality of judgments.[18]

ANY ALLEGED INADEQUACY IN THE GEORGIA PROCEDURE WAS OF NO PREJUDICE TO PETITIONER.

The primary argument that Brown presents in his petition concerns the fact that the Georgia legislature did not require in the Special Master Act that notice be given to the condemnee when the Special Master filed his return in the Superior Court. The Act only requires that the Master's award be entered within three days of the hearing. The Superior Court is then left to immediately make that award the judgment of the Court thereby vesting title in the Condemnor and ending the period for filing exceptions to the Master's award on grounds other than the correct determination of value.

As will be noted in the succeeding arguments, appellate procedure is a matter within the discretion of a state. What is more, the condemnee *sub judice* was represented by able counsel. (Supp. A. 21). The Georgia Courts in the numerous decisions previously cited in this response had made clear the requirements for addressing non-value arguments to the Special Master and the

[18] **Thistlethwaite** v. **City of New York,** F.2d (2 Cir. 1974), 42 LW 2630; **Francisco Enterprises, Inc.** v. **Kirby** 482 F.2d 481, 485 (1973); **cert. den.** U.S. (1974), 42 LW 3468; **PI Enterprises Inc.** v. **Cataldo,** 457 F.2d 1012 (1 Cir. 1972); **Coogan** v. **Cincinnati Bar Association,** 431 F.2d 1209 (6 Cir. 1970); **Brown** v. **Chastain,** 416 F.2d 1012 (5 Cir. 1969); **Rhodes** v. **Meyer,** 334 F.2d 709 (8 Cir.), **cert den.** 379 U.S. 915 (1964).

Superior Court. A condemnee, thus represented at a time when the statutory requirements had been repeatedly specified and emphasized on appellate review, is substantially handicapped in asserting that he is the victim of unreasonableness and injustice.

What is even more striking is that Petitioner was not really prejudiced by the lack of notice which he has so fervently presented for scrutiny at all levels of the federal judiciary. To prove this point, it can even be assumed *arguendo* that the lower courts should have rejected *res judicata* and given Brown a federal forum. It can also be assumed *arguendo* that Brown should have been given notice before the Superior Court entered judgment on the Master's award. Then assume that to remove the prejudice of the lack of notice, Brown must be allowed to present for adjudication all the arguments which he could have presented by filing exceptions with the Superior Court had he been given notice in the first place. But the fact remains, even after making the above assumptions, which Georgia Power will argue should not be made, that Brown had only *one* point on which he could have based an exception.

It must be remembered that the Georgia law requires non-value issues to be raised not only by exceptions filed with the Superior Court but also by presentation to the Special Master.[19] The only non-value matter presented to the Special Master concerned a Constitutional challenge to the necessity for condemning Brown's land. This objection was denied by the Special Master and no other non-value matter was ever presented.[20] While Brown

[19] **Ante** at p. 6-7.

[20] **Ante** at p. 3.

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The primary argument that Brown presents in his petition concerns the fact that the Georgia legislature did not require in the Special Master Act that notice be given to the condemnee when the Special Master filed his return in the Superior Court. The Act only requires that the Master's award be entered within three days of the hearing. The Superior Court is then left to immediately make that award the judgment of the Court thereby vesting title in the Condemnor and ending the period for filing exceptions to the Master's award on grounds other than the correct determination of value.

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[18] **Thistlethwaite** v. **City of New York,** F.2d (2 Cir. 1974), 42 LW 2630; **Francisco Enterprises, Inc.** v. **Kirby** 482 F.2d 481, 485 (1973); **cert. den.** U.S. (1974), 42 LW 3468; **PI Enterprises Inc.** v. **Cataldo,** 457 F.2d 1012 (1 Cir. 1972); **Coogan** v. **Cincinnati Bar Association,** 431 F.2d 1209 (6 Cir. 1970); **Brown** v. **Chastain,** 416 F.2d 1012 (5 Cir. 1969); **Rhodes** v. **Meyer,** 334 F.2d 709 (8 Cir.), **cert den.** 379 U.S. 915 (1964).

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[19] **Ante** at p. 6-7.

[20] **Ante** at p. 3.

may claim that he had no notice when the Superior Court entered judgment, he does not and cannot contend that there was any excuse for not presenting his contentions to the Special Master. (Supp. A. 11-13, 16, 17, 19, 21).[21]

Thus even if Brown had been notified in order to allow him to file exceptions before the Superior Court entered judgment, he could only have sought judicial review of the necessity for the condemnation, the one issue which was raised before the Master. And even assuming that Brown lost the opportunity to challenge the necessity of the taking, no issue of Constitutional significance was or is presented, because this Court has long espoused the view that necessity for taking does not merit judicial review and is not a matter subject to the United States Constitution.[22]

THE MECHANICS OF APPEAL IN THE GEORGIA EMINENT DOMAIN STATUTE ARE NOT OF CONSTITUTIONAL IMPORTANCE.

In asserting a denial of due process in the rapid succession in which the entry of judgment of the Superior Court of Burke County followed the report of the Special Master, Brown complains that he was not given sufficient notice in order to file exceptions with the Superior Court. The harm here, according to Brown, is that this procedure took away his right to have the decisions of the Special Master reviewed by the Superior Court.

It is correct that the entry of judgment by the Superior Court ended any chance for review of

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[21] **Ante** at p. 2-3.

[22] **Joslin Mfg. Co.** v. **City of Providence,** 262 U.S. 668, 678 (1923).

non-value matters for which exceptions had not been filed.[23] Nonetheless, the procedure for review of Special Master decisions as adopted by the legislature and courts of Georgia is a matter exempt from Constitutional scrutiny. There is no due process right to an appeal. It is within the discretion of the State of Georgia to empower a Special Master to decide all issues relevant to condemnation. It is also within the State's discretion to allow no appeal from those decisions or to allow an appeal only if exceptions are filed prior to judgment by the Superior Court, and it was for the State to decide that a notice provision would not be added to the procedural framework. If the process was improperly implemented, it is in any event for state courts to decide.[24]

Thus regardless of the propriety of the *res judicata* holding below, Brown's complaint about the Georgia procedure which allowed the judgment of the Superior Court to terminate the opportunity to obtain review of the Special Master's award is only an objection to the procedure for appeal. This Court has long held that state appellate procedures are not subject to the due process clause. No purpose would be served by granting certiorari here to review again this oft decided point of law.

THE IMPLEMENTATION OF THE GEORGIA EMINENT DOMAIN STATUTES PRESENTS NO FEDERAL OR CONSTITUTIONAL ISSUE.

It should also be noted that even if some Constitutional flaw were to be found in the absence of notice to Brown that the Superior Court would enter judgment on the Special Master's award, the

[23] **Ante** at p. 6-7.

[24] **Lindsey** v. **Normet,** 405 U.S. 56, 77 (1972); **Reetz** v. **Michigan,** 188 U.S. 505, 508 (1903).

underlying Constitutional issues which Brown would then raise have no merit. Looking to Brown's complaint in the District Court, one sees that the absence of notice in the entry of judgment by the Superior Court is presented as a justification for District Court consideration of Brown's substantive challenges to the condemnation of his former land, e.g., Georgia Power did not have statutory power to condemn in fee simple; it violated equal protection for Georgia Power to be able to condemn land while other companies could not; the condemnation statutes did not require sufficient proof of necessity to condemn or provide for proof of uniqueness or unique value of condemned land. (A. 5-6, 8-10).

However, these types of challenges are manifestly inappropriate for Federal review. Whether an eminent domain statute is correctly administered by the state judiciary is a state matter, and even a violation of the statute by the state does not infringe upon rights secured by the laws and Constitution of the United States.[25] To the extent that the Georgia statutes themselves are challenged, this Court has long held that if "any compensation" is paid for the condemned land, the condemnation is in compliance with the United States Constitution.[26] Matters of administration of the state statute, procedure, necessity, and uniqueness are state concerns.[27]

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[25] **Snowden** v. **Hughes,** 321 U.S. 1, 8-12 (1944); **McDonald** v. **State of Texas,** 465 F.2d 1342, 1345-46 (5 Cir. 1971), **en banc,** 465 F.2d 1349.

[26] **McGovern** v. **New York,** 229 U.S. 363, 370-71 (1913).

[27] **Backus** v. **Fort Sheet Union Depot Company,** 169 U.S. 557 (1898); **Adriondack Railroad Co.** v. **New York,** 176 U.S. 335 (1900); **Sears** v. **Akron,** 246 U.S. 242 (1918); **Bragg** v. **Weaver,** 251 U.S. 57 (1919); **Rindge Company** v. **Los Angeles County,** 262 U.S. 700 (1923).

Thus regardless of the *res judicata* effect of the judgment of the Superior Court of Burke County, and regardless of whether this Court is concerned with the Georgia procedure for appealing the findings of a special master, the substance of Brown's District Court action does not state a claim on which relief could be granted. The pleadings below simply ask the court to find Constitutional issues where this Court has plainly indicated that there are none. If there is then no merit in the substance of Brown's federal action, a grant of certiorari based on other matters presented by him would only be a hypothetical and academic exercise.

BROWN'S COLLATERAL SUIT IN FEDERAL COURT IS BARRED BY ESTOPPEL.

There remains one other measure by which Brown's federal suit is found lacking. It too is a sound basis for dismissal without reaching federal or Constitutional claims. The underlying facts are that Brown has withdrawn from the Superior Court the $55,750.00 awarded by the Special Master and paid by Georgia Power and has applied those funds to his personal use. (Supp. A. 153). The estoppel arises under the established principle that "a litigant shall not be heard to impugn the validity of a proceeding, of which, to a substantial degree, he has voluntarily accepted the benefits, no matter in what state of maturity the proceedings may be."[28]

[28] **Wilson** v. **Union Electric Light and Power Company,** 59 F.2d 580, 583 (8 Cir. 1932); **accord, Robinson** v. **Transcontinental Gas Pipe Line Corp.,** 306 F. Supp. 201, 208 (N.D. Ga. 1969), **aff'd on other grounds,** 421 F.2d 1397 (5 Cir. 1969), **cert. den.,** 398 U.S. 905 (1969); **Livesay Industries** v. **Livesay Window Company,** 202 F.2d 378 (5 Cir. 1953); **See also, Davis** v. **Wakelee,** 156 U.S. 680, 691 (1895); **Burgess** v. **Nail,** 103 F.2d 37, 44 (10 Cir. 1939).

Here Brown has accepted the Master's award but in the substantive counts of his federal complaint alleges various reasons why the Master's award should be overturned. Regardless of the validity of the procedure whereby the Superior Court entered judgment on the Master's award, Brown in accepting the amount of the award has lost the right to challenge on substantive grounds what occurred in the Special Master proceeding. Accordingly no purpose would be served by a decision of this Court concerning notice and the entry of judgment.

THE REMAINING QUESTIONS PRESENTED BY PETITIONER WERE NOT PROPERLY RAISED BELOW NOR SUPPORTED BY THE RECORD.

Brown asserts a constitutional deprivation through allegations that the record of trial in the Superior Court of Burke County, Georgia has not been made available to him, and in the fact that the Superior Court without first giving notice or allowing a hearing struck his "Answer" and "Appeal" wherein he attempted to raise issues other than value. (Supp. A. 31-35).

There is not one thing in the record to support the contention that Brown has been deprived of the record. In fact this is a false statement.[29] Furthermore, even if true, there are ample state remedies to require the court reporter or the Clerk of the Superior Court to furnish the record. (Ga. Code Ann. §64-101).

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[29] The court reporter for the Superior Court of Burke County, Georgia delivered this transcript to counsel for Brown and Georgia Power during the week of June 10, 1974, and Brown's motion for new trial has been rescheduled.

The record is also completely void of any attempt by Georgia Power to withhold any record of trial from Brown. Additionally the issue was not asserted whatsoever in the District Court and the only grounds for this proposition before the Court of Appeals and this Court is the unsupported assertion in the briefs filed by Brown. Issues unsupported by the record should not be reviewed in this Court.[30]

Similarly in respect to the matter of striking Brown's Answer and Appeal in the Superior Court, the contention is not supported in the record. In fact the record establishes to the contrary - that these filings were stricken only *after a "hearing"* and *"argument of counsel"*. (Supp. A. 36-37, App. 30-31, 38 of Petition). In any event Brown's contention was not raised in any court below and should not be reviewed in this Court.[31]

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[30]**Standard-Vacuum Oil Company** v. **United States,** 339 U.S. 157, 160 (1949); **Evans** v. **Stettnisch,** 149 U.S. 605, 606-07 (1892).

[31]**Adickes** v. **S. H. Kress & Company,** 398 U.S. 144, 147, n.2 (1970); **Lawn** v. **United States,** 355 U.S. 339, 362-63, n.17 (1958).

CONCLUSION

This case is manifestly inappropriate for review by writ of certiorari. As discussed in the foregoing, petitioner's primary contention was adjudicated in a state court proceeding. The District Court and Court of Appeals correctly concluded that *res judicata* requires that petitioner obtain review of that adjudication in the appellate courts of Georgia. The other contentions presented in the present petition almost trifle with this Court by presenting matters unsupported in the record or not raised below.

Moreover even if this Court were to differ from the conclusion concerning *res judicata* the foregoing argument has presented various reasons why the substance of Petitioner's federal action was without merit, or why there was no prejudice to petitioner even if one assumes some irregularity of the type asserted. Where petitioner is foreclosed on the merits of his action, there is nothing to gain in reviewing his claim of Constitutional harm from the procedural determinations made against him.

For these reasons, it is respectfully urged that the Supreme Court not issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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